

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant: Kumar et al.
Title: ELECTROCHEMILUMINESCENCE FLOW CELL AND FLOW CELL
COMPONENTS
Appl. No.: 10/600,164
Filing Date: 06/19/2003
Patent No.: 7,553,448
Grant Date: 06/30/2009
Examiner: Turk, Neil N.
Art Unit: 1797
Conf. No.: 9722

REQUEST FOR RECONSIDERATION OF PATENT TERM ADJUSTMENT
UNDER 37 C.F.R. §1.705

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

Applicants respectfully request reconsideration of the Patent Term Adjustment (PTA) determined for the captioned patent, which issued on 06/30/2009 as U.S. Patent No. 7,553,448.

The Patent Office determined that the patent was entitled to 539 days of PTA. Applicants believe that this PTA determination was made in accordance with the “Explanation of 37 CFR 1.703(f) and of the United States Patent and Trademark Office Interpretation of 35 U.S.C. §154(b)(2)(A)” published at 69 Fed. Reg. 34238 (Jun. 21, 2004). Under that interpretation of the PTA statute, any PTO delay under 35 U.S.C. § 154(b)(1)(A) is deemed to overlap with any 3-year maximum pendency delay under 35 U.S.C. § 154(b)(1)(B), and so, as a practical effect, PTA may be awarded under §154(b)(1)(A) or §154(b)(1)(B), but not both.

On September 30, 2008, the United States District Court for the District of Columbia issued a decision finding that the U.S. Patent and Trademark Office's interpretation of the PTA statute is incorrect. *Wyeth v. Dudas*, Civ. Action No. 07-1492 (JR) (Sep. 30, 2008). The court determined that, under the correct interpretation of the PTA statute, periods of "overlap" are limited to "periods of time . . . [that] occur on the same day." *Wyeth*, slip op. at 8. Thus, a PTO delay under §154(b)(1)(A) overlaps with a delay under §154(b)(1)(B) only if the delays "occur on the same day." *Id.*

Applicants have recalculated PTA for the captioned patent under the court's interpretation of the PTA statute, and have determined that the patent is entitled to 1037 days PTA, as shown on the attached sheet, which shows the relevant delays under 37 CFR §§1.702(a) and (b), and under 37 CFR §§1.703(a) and (b).

The attached sheets detail the circumstances during the prosecution of the application resulting in the patent that constitute a failure to engage in reasonable efforts to conclude processing or examination of such application as set forth in § 1.704.

(a) Total of non-overlapping PTO delay under §154(b)(1)(A) & (B):	1220 days
(b) Total Applicant delay:	183 days
Final PTA Determination:	1037 days

Applicants therefore respectfully request that the patent be accorded 1037 days PTA.

The patent is not subject to a terminal disclaimer.

Payment of the requisite fee is submitted herewith. Should no proper payment be enclosed herewith, as by the credit card payment instructions in EFS-Web being incorrect or absent, resulting in a rejected or incorrect credit card transaction, the Commissioner is authorized to charge the unpaid amount to Deposit Account No. 19-0741.

However, because this PTA error is due to a Patent Office error in interpreting and applying the PTA statute, a refund of the fee is respectfully requested.

Applicants request further that a decision on this request be **deferred or delayed** until a final decision has been rendered in *Wyeth v. Dudas*, which is now on appeal at the U.S. Court of Appeals for the Federal Circuit, under Federal Circuit Docket No. 2009-1120.

Respectfully submitted,

Date August 28, 2009

By /John M. Lazarus/

FOLEY & LARDNER LLP
Customer Number: 26371
Telephone: (414) 297-5591
Facsimile: (414) 297-4900

John M. Lazarus
Attorney for Applicant
Registration No. 48,367

CLOSE WINDOW

ALL CASES SELECT CASE

Patent Term Adjustment Calculation System

Add a new event to this case

Docket Number: 090900-0158
 Application Number: 10/600164
 Patent Number: N/A

	Event Description	Event Date	Days from Filing	PTO Days	Applicant Days
Edit Delete	Application Filing Date	06/19/2003	0		
Edit Delete	IDS NOT falling under 1.704(c)(6), (8) or (10) filed at PTO	09/16/2003	89		
Edit Delete	Notice to File Missing Parts	10/27/2003	130		
Edit Delete	Response to Notice to File Missing Parts	12/23/2003	187		
Edit Delete	IDS NOT falling under 1.704(c)(6), (8) or (10) filed at PTO	01/22/2004	217		
	14 month From Application date	08/19/2004	427		
Edit Delete	IDS NOT falling under 1.704(c)(6), (8) or (10) filed at PTO	11/14/2005	879		
	3 Year Period Starts	06/19/2006	1,096		
Edit Delete	Restriction Requirement	07/17/2006	1,124	(697)	
	Restriction Requirement + 3 months	10/17/2006	1,216		
Edit Delete	Restriction Requirement Response Received at PTO	11/16/2006	1,246		
Edit Delete	Notice of Non-Compliance	12/01/2006	1,261		
Edit Delete	Non-Final Office Action Rsp. Rcv'd at PTO	12/21/2006	1,281		
Edit Delete	Notice of Non-Compliance	01/22/2007	1,313		
Edit Delete	Non-Final Office Action Rsp. Rcv'd at PTO	01/29/2007	1,320		(104), (74),(39) 104
Edit Delete	Final Office Action	04/10/2007	1,391		
	Final Office Action + 3 months	07/10/2007	1,482		
Edit Delete	Notice of Appeal Received at PTO	09/27/2007	1,561		79
Edit Delete	Final Office Action Response Received at PTO	09/27/2007	1,561		
Edit Delete	Advisory Action	10/19/2007	1,583		
Edit Delete	Request For Continued Examination (including amendment)	11/27/2007	1,622	(526) 1195	
Edit Delete	IDS NOT falling under 1.704(c)(6), (8) or (10) filed at PTO	11/27/2007	1,622		
Edit Delete	Final Office Action Response Received at PTO	11/27/2007	1,622		
Edit Delete	Request For Continued Examination (including amendment)	11/27/2007	1,622		
	3 Year Period Stopped	11/27/2007	1,622		
	Request For Continued Examination + 4 months	03/27/2008	1,743		

	Final Office Action Rsp. Rcv'd at PTO + 4 mo.	03/27/2008	1,743	
Edit Delete	Non-Final Office Action	04/21/2008	1,768	25
Edit Delete	Non-Final Office Action	04/21/2008	1,768	
Edit Delete	Non-Final Office Action Rsp. Rcv'd at PTO	07/17/2008	1,855	
Edit Delete	Final Office Action	10/28/2008	1,958	
Edit Delete	IDS NOT falling under 1.704(c)(6), (8) or (10) filed at PTO	12/22/2008	2,013	
Edit Delete	Final Office Action Response Received at PTO	12/22/2008	2,013	
Edit Delete	Advisory Action	01/09/2009	2,031	
Edit Delete	Final Office Action Response Received at PTO	01/21/2009	2,043	
Edit Delete	Notice of Allowance	02/27/2009	2,080	
Edit Delete	Issue Fee Paid	05/22/2009	2,164	
Edit Delete	Patent Grant Date	06/30/2009	2,203	
			Totals:	1,220 183
			PTA:	1,037

Created and maintained by
FOLEY
FOLEY & LARDNER LLP

Version: 3.02.05

LOGIN: Carolyn Simpson

IP: 10.50.33.39

Foley & Lardner LLP